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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 915

WILLIAM DORN, JR.,
Petitioner,

vs.

BALFOUR, GUTHRIE & CO., LIMITED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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The respondent's only connection with the petitioner's alleged injury on board the *Rimac*, a Peruvian Naval ship, was that it had agreed to handle her shoreside business while in port in San Francisco Bay. The petitioner's request for certiorari asks this Court, in effect, to consider whether respondent, as port agent, became responsible for the safety conditions on the vessel merely because it assumed such an agency. This involves only questions of fact, decided below.

The Court of Appeals decided there was no such responsibility. That decision created no conflict with decisions of other Courts of Appeals or of this Court; nor did it decide any important question of federal law. There is no reason to consider the matter further.

QUESTIONS PRESENTED

The matter apparently intended to be covered by Question (1) in the Petition (pages 2-3) would be more accurately stated as follows:

(a) Were the District Court and Court of Appeals correct in deciding that, under the facts of this case, the respondent owed no duty to the petition with respect to maintenance of the vessel; and

(b) Were the District Court and Court of Appeals correct in determining that the respondent was not negligent toward the petitioner independent of any responsibility for maintenance of the vessel.

Petitioner's Question (2) is not in the case. The Court of Appeals did not hold that an agent is not liable for nonfeasance.

STATEMENT OF THE CASE

With two fairly minor exceptions[1], the petitioner's "Statement of Facts" is not inaccurate. However, it fails to present a complete picture of the circumstances under which the respondent acted as port agent for the *Rimac*.

It bears emphasis that the *Rimac* was a vessel of the Peruvian Navy, and was at all times under the command of Peruvian Naval officers (Finding 2, 1 R. 76:4-5). The

1. Petitioner's statement is in error in two respects:

(a) The record does not support the inference that the respondent was agent for all Peruvian Naval vessels. Keefer testified (2 R. 149:23-24) that respondent had handled Peruvian ore ships, not naval vessels. In fact, the special appointment to act as agent for the *Rimac* was made by Grace & Company (Pacific Coast), which performed the stevedoring on the *Rimac* and was petitioner's employer (Pl. Ex. 5, 1 R. 39:20-40:2; 2 R. 173).

(b) The Court below did not determine whether petitioner actually fell while on the *Rimac* or, if he did, whether he was injured (Findings, 1 R. 75-77). These matters were seriously disputed at the trial (Defendant's Opening Statement, 2 R. 10).

respondent's only function as port agent was to assist the master and shipowner with respect to shore-side arrangements—to arrange for services and supplies for the vessel (Finding 3, 1 R. 76). The limited nature of the respondent's connection with the vessel appears in the District Court's Findings 5 and 6 (1 R. 77):

> "5. The only employees or agents of Balfour who went aboard or were in the vicinity of the *Rimac* at any time during the period she was berthed at Selby on or about or before August 29, 1954 were C. F. Keefer and W. W. Carter. These men attended the vessel on different days and neither of them was aboard or in the vicinity of the vessel for longer than about one hour each day. Neither of these men was given any duty, authority or responsibility or exercised any authority or control in connection with the cleaning or maintenance of the decks or winches or any other part of the vessel or her equipment. They did not cause or permit oil to fall or accumulate or remain on the deck of the *Rimac* or otherwise cause or permit the vessel to become dangerous, unsafe, defective or unseaworthy.
>
> "6. The plaintiff's work as longshoreman aboard the *Rimac* was performed as as employee of Grace & Company (Pacific Coast), which was appointed by the Republic of Peru and not by Balfour to provide stevedore services to the vessel at Selby. Balfour did not employ Grace & Company (Pacific Coast) to provide such services and the plaintiff was not aboard the *Rimac* with the consent or at the invitation of Balfour."

Petitioner's statement that the respondent "handled complaints as to working conditions" might be misleading. As the record relied on by the petitioner indicates (Appendix "B" to the Petition), respondent "handled complaints" only in the sense that it discussed longshoremen's complaints with port officials and longshoreman representatives, made

recommendations to the master of the vessel and then carried out the master's instructions. This was strictly shoreside business and did not involve any supervision or control over shipboard working conditions.

Some misconceptions might also be created by the documents quoted in Appendix "B" of the Petition. The first four documents quoted there relate to respondent's activities as agent in the Puget Sound area and at Los Angeles. In those areas it was given the responsibility of appointing the stevedores; but at Selby, on San Francisco Bay, where petitioner claims he was injured, respondent did not appoint the stevedore. On the contrary, it was the stevedore, Grace & Company (Pacific Coast) which appointed respondent as agent for the vessel (Pl. Ex. 5, 1 R. 39:20-40:2, 2 R. 173).

The Specifications of Error in the Petition, page 5, misstate the decision of the Court of Appeals. The Court did not hold that a port agent owes no duty at all to a longshoreman. It held only that in the circumstances of this case the respondent owed the petitioner no duty with respect to the condition of the *Rimac* or her decks. Nor did it hold that the liability of an agent arises only on active negligence; it held only that the respondent had not undertaken any duties with respect to the condition of the *Rimac* or her decks.

Moreover, in view of petitioner's reliance on *Romero v. International Terminal Operating Co.* (1959), 358 U.S. 354, 3 L.Ed. 2d 368, 79 S.Ct. 468, it should be noted that the petitioner does *not*, and could not, specify as error any failure by the courts below to consider whether the respondent was negligent, independent of employment or control of the vessel. Whether there was such negligence was an issue at the trial, and the findings affirmatively established the absence of any such negligence. In Finding 4 the District Court found that respondent

"did not cause or permit oil to fall or accumulate or remain on the deck of the *Rimac* or otherwise cause or permit the ship to become dangerous, unsafe, defective or unseaworthy." (1 R. 76: 22-25).

ARGUMENT

A. The Authorities Are in Accord That a Shoreside Husbanding or Port Agent Is Not Responsible for the Vessel's Condition.

Both the District Court and the Court of Appeals concluded, after reviewing the evidence, that the respondent as a port agent for the *Rimac* had not undertaken any responsibility for the vessel's condition. While we will not burden the Court with a review of the evidence on that point, it may be helpful to refer to the affidavit of Mr. Bailey, put in evidence by the petitioner, as to the general scope of a port agent's responsibility:

> "that Balfour did not at any time manage or have authority to manage the said vessel and did not have any function, activity or relationship with respect to the said vessel or her owners other than as port agent; That as port agent Balfour was assigned the function customarily performed by port agents except that it was not authorized to and did not arrange for stevedore services, or collect freight moneys; that Balfour did not invite the plaintiff or any other stevedore on board the *Rimac* and it neither had the authority to, nor did, consent to the plaintiff's presence there; that the only function customarily performed by a port agent and the only authority or duty given to Balfour was to arrange for berthing the vessel and to arrange for such further services and supplies for the said vessel as might be requested by her master or by the Republic of Peru, as her owner; that Balfour's assistance to the *Rimac* included arranging for a Bar Pilot, arranging for a Bay Pilot and Tug assistance, notification to the Marine Exchange of ship movements, assistance in getting Customs clearance for the vessel,

purchase of provisions, charts and rope, and arranging for similar services and supplies.

"That port agents customarily do not have and Balfour did not have any authority or control over the vessel or her master, officers or crew or any authority or duty with respect to maintaining the vessel, her decks, winches or other equipment or keeping the same in safe condition; that Balfour did not perform or arrange for any work in connection with the operation or maintenance of the winches or maintenance or cleaning of the decks in the vicinity of the winches;

"That the only employees of Balfour who were aboard or in the vicinity of the *Rimac* from August 27 through August 29, 1954, were C. F. Keefer and W. W. Carter;

"That he had no knowledge or notice of the accident alleged in the Complaint prior to service of the Complaint;" (Pl. Ex. 2; 1 R 20-22; 2 R 137: 6-10)

The conclusions of the Court below that a port agent with these limited functions is not responsible for the vessel's condition receives strong support from the few reported decisions on similar matters.

With respect to a *general* agent, which undertakes to act for the owner in connection with operation and management of the vessel, there have been substantial questions as to the general agent's liability to third parties with respect to the safe condition of the vessel. But even in that situation the Supreme Court has held that the general agent did not have such possession and control of the vessel as to make it liable to a longshoreman injured on board. *Caldarola v. Eckert* (1947), 332 U.S. 155, 67 S. Ct. 1569. The court held the general agent not liable even though the agent, under the standard form of General Agency Agreement with the United States, had expressly agreed to "equip, victual, supply and maintain" the vessel. Consistent with this, the Supreme Court held also that such a general

agent was not liable to a seaman. *Cosmopolitan Shipping Company, Inc. v. Robert A. McAllister* (1949), 337 U.S. 783, 69 S. Ct. 1317:

> "The Caldarola Case, 332 U.S. 155, 91 L. ed 1968, 67 S. Ct 1569, undermined the foundations of Hust. See the dissent therein at pp. 161-163. Caldarola held that the general agents under the standard form contract were not in possession and control of the vessel so as to make them liable under New York Law to an invitee for injuries arising from negligence in its maintenance, pp. 158, 159. Our ruling was based on 'the interpretation of that contract' as 'a matter of federal concern.' We do not think it consistent to hold that the general agent has enough 'possession and control' to be an employer under the Jones Act but not enough to be responsible for maintenance under New York law. It is true, as respondent argues, that Cardarola dealt only with the general agent's liability to a stevedore, as opposed to a crew member, under the law of New York. We think, however, that vicarious liability to anyone must be predicated on the relation which exists under the standard form agreement and the shipping articles between the general agent on the one hand and the master and crew of the vessel on the other. Caldarola held that this relation was not one which involved that proximity necessary to a finding of liability in the general agent for the torts of the master and crew. We perceive no reason why the rationale of this holding does not apply with equal force to a suit under the Jones Act. Under common law principles of agency such a conclusion is required. * * *. (p. 793)"

One of the important considerations in both *Caldarola* and *Cosmopolitan* was that the ship's master remained in full control of the vessel. In those cases the master was an employee of the United States government. In the present case he was an officer of the Peruvian Navy. The District Court specifically found that at all times material to the

complaint the *Rimac* was under the command of Peruvian Naval officers and that the respondent had no authority over them (1 R, 76:1-15).

If a *general* agent is not responsible to the third parties for the vessel's condition, *a fortiori* a mere port agent is not. Indeed, we are aware of only one other decision in which such a claim apparently was advanced—and then the court, in dismissing the complaint, found it neceesary to say little more than this:

> "it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal * * *".
>
> *Romero v. International Terminal* (1956, 142 Fed. Supp. 570), *Affd.* on opinion below on this point—(1957, C.A.2) 244 Fed. 2d 409; vacated and remanded (1959) 358 U.S. 354, 3 L.Ed. 2d 368, 79 S. Ct. 468.

In vacating the District Court judgment in *Romero* the Supreme Court approved this holding by the lower courts. The remand was only for the purpose of determining whether the petitioner was asserting a claim based upon negligence, "independent of the employment relationship or operation and control." (358 U.S. 384, 3 L.Ed. 2d 389, 79 S.Ct. 487). This point will be discussed further in Part B below.

A vessel coming into a foreign port must make many arrangements with shoreside concerns for supplies and services needed in port. These arrangements cannot conveniently or economically be made without the assistance of a husbanding agent who knows the port and its facilities. There is no basis for the petitioner's contention that a port agent, in agreeing to give such assistance, renders itself liable to any and every person who may be injured due to unsafe conditions aboard the vessel.

B. The District Court Determined That the Respondent Was Not Negligent, Independent of Operation or Control of the Vessel.

Petitioner's attempt in the lower courts was to establish that respondent was negligent by showing that it had undertaken to maintain the vessel and her decks in safe condition. This contention has been disposed of by the courts below.

Now, relying on *Romero*, *supra*, petitioner argues that the respondent could be liable for negligence independent of operation or control of the vessel. This would be so, of course, if there were any facts to support a finding of negligence. But this issue also has been disposed of by the District Court's finding that the respondent did not cause or permit the alleged oil on the deck of which petitioner complained (Finding 4, 1 R 76:22-25).

The *Romero* case was decided by the District Court at pre-trial, and the question before the Supreme Court was whether the court had overlooked a possible claim of negligence. But neither in the Court of Appeals nor in this Court has the petitioner in this case claimed that the District Court overlooked any claim that respondent was negligent.

Romero is of no assistance to the petitioner. The negligence issue has been decided in this case.

C. The Court of Appeals Applied the Correct Rules of Law. It Did Not Exonerate Nonfeasance.

Petitioner attempts to fabricate a conflict between the Courts of Appeals by saying that in this case the Court of Appeals held that an agent was liable only for "active negligence" and not for "nonfeasance". He alleges that the Court of Appeals drew a distinction between "misfeasance" and "nonfeasance". This is a straw man. The Court of Appeals made no such holding.

What the Court of Appeals *did* say was that an agent is not liable for failure to carry out its agency unless and until "it has entered upon performance of such duties and thereafter was guilty of some negligence" (262 F.2d 48, 50; 3 R 4). The Court had already concluded that the evidence supported the District Court's finding that the respondent had not been employed to maintain the vessel. This was sufficient for affirmance of the judgment.[2] Then the Court of appeals noted as an additional ground that even if the respondent *had* been employed to maintain the vessel, it still would not be liable until it entered upon performance and "thereafter was guilty of some negligence."

There was no suggestion whatever that an agent who *has undertaken* or entered upon performance of certain duties is liable only for active negligence and not liable for nonfeasance. The fact is that the respondent did not undertake to maintain the vessel. In the absence of such an undertaking (and in the absence of any other negligence), the respondent could not be liable. The Court of Appeals decided no more than that.

Cases from other circuits referred to by the petitioner consider the liability of an agent who *had* undertaken certain duties. There is nothing in the decision of the Court of Appeals in this case which is in conflict with them.

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2. Petitioner had not contended that the District Court erred in any other respect.

3. *U.S. v. Hull*, 195 F.2d 64; *McDonnell v. Wasenmiller*, 74 F.2d 320.

CONCLUSION

The courts below have properly disposed of all of the factual issues. The Court of Appeals applied the proper rules of law. There is no conflict between its decision and decisions of the Supreme Court or other Courts of Appeals. The petition should be denied.

Dated: June 4, 1959.

Respectfully submitted,

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